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# Supreme Court of the United States

**OCTOBER TERM, 1947**

**No. 818 - 826** (See 802-803)

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., Petitioner, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Respondent.

GEORGE MONTGOMERY, State Tax Collector, etc., Petitioner, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Respondent.

LIONEL G. OTT, Commissioner of Public Finance and Ex-Officio City Treasurer, etc., Petitioner, vs. AMERICAN BARGE LINE COMPANY, Respondent.

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GEORGE MONTGOMERY, State Tax Collector, etc., Petitioner, vs. MISSISSIPPI VALLEY BARGE LINE COMPANY, Respondent.

GEORGE MONTGOMERY, State Tax Collector, etc., Petitioner, vs. AMERICAN BARGE LINE COMPANY, Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT
## and
## BRIEF IN SUPPORT THEREOF.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer of the City of New Orleans,

Louisiana, and George Montgomery, State Tax Collector for the Parish of Orleans, State of Louisiana, in their respective official capacities, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on March 5, 1948, which said judgment held that the tugboats and barges of Mississippi, American and Union Barge Lines had acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans.

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## JUDGMENT OF CIRCUIT COURT OF APPEALS.

The judgment of the United States Circuit Court of Appeals was entered on March 5, 1938, and a rehearing was refused on April 13, 1948, and reported as: "Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,117; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,118; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,119; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,120; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. American

Barge Line Company, Appellee, No. 12,121; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,122; Lionel G. Ott, Commissioner of Public Finance and Ex-Officio City Treasurer for the City of New Orleans, Appellant, vs. Union Barge Line Corporation, Appellee, No. 12,123; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. Mississippi Valley Barge Line Company, Appellee, No. 12,125; George Montgomery, State Tax Collector for the City of New Orleans, Appellant, vs. American Barge Line Company, Appellee, No. 12,126"; and were all consolidated for trial, briefing and argument, with separate judgments entered in each case.

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## JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. Section 347).

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## SUMMARY STATEMENT OF MATTER INVOLVED.

The State of Louisiana and the City of New Orleans levied an *ad valorem* tax against the American Barge Line Company, the Mississippi Valley Barge Line Company and the Union Barge Line Corporation, on a portion of their tow-boats and barges, for the years 1944 and

1945, under Act 152 of 1932, as amended by Act 59 of 1944 of the Legislature of Louisiana. This Statute gives to the State of Louisiana and the City of New Orleans the right to levy these *ad valorem* taxes on a portion of this watercraft in the ratio which the number of miles of lines of these barge line companies within Louisiana bears to the total number of miles of their entire lines.

These barge line companies paid the taxes under protest and filed suit for their recovery, in accordance with the provisions of Act 330 of 1938 of the Legislature of Louisiana.

The above nine cases, together with two cases of the DeBardeleben Coal Corporation, were consolidated for trial in the United States District Court, with one opinion being rendered and separate judgments entered in each case. The District Court held that in the above nine cases, this watercraft had acquired no tax situs in Louisiana, and that in the DeBardeleben cases, Louisiana had the right to the entire tax and could not tax on the proportionate basis as to mileage.

These eleven suits were appealed by the State of Louisiana and the City of New Orleans to the United States Circuit Court of Appeals for the Fifth Circuit, and were there consolidated for trial, resulting, in that Court, in judgment for the appellee barge lines in the above nine cases and in judgment for the City of New Orleans in the two DeBardeleben cases, as to the Federal questions involved.

## THE QUESTION PRESENTED.

(1) The question presented is whether the levying of a tax by the State of Louisiana and the City of New Orleans on a portion of the value of the towboats and barges of these barge lines, under the pertinent sections of Act 152 of 1932, as amended by Act 59 of 1944 of the Legislature of Louisiana, violates any of the provisions of the Constitution of the United States, particularly the due process of law clause of the 14th Amendment.

(2) Whether there is a need to establish a permanent tax situs, as such, of movable property engaged as an entity in interstate commerce, which operates constantly and regularly within the State of Louisiana, in order to entitle that State to its share to these taxes in proportion to the mileage of such watercraft within and without the State, identically as allowed in the case of the rolling stock of railroads and on the equipment of other types of transportation companies engaged in interstate commerce.

(3) Whether, if such a tax situs must be established to allow a State to tax, there has not been established a tax situs as to that average number of this watercraft which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation.

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## STATUTE INVOLVED.

The statute involved is Act 152 of 1932 of the Legislature of Louisiana, as amended by Act 59 of 1944 of the Legislature of Louisiana.

**REASONS RELIED UPON FOR ISSUANCE OF WRIT.**

The reasons relied upon by petitioners for the issuance of a writ of certiorari herein are that the United States Circuit Court of Appeals for the Fifth Circuit:

(A) Has decided an important question of Federal Law which has not been, but should be settled by this court;

(B) Has decided this question in such a manner as to render a Louisiana Statute inoperative and of no effect.

The Circuit Court of Appeals for the Fifth Circuit, as the basis for its decision, states:

> "But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways."

The question of watercraft using the high seas has never been an issue in these cases. The issue is to watercraft using navigable inland waterways in an integrated system of transportation with an average number of this watercraft in Louisiana every day in the year. The reason that the principle of tax apportionment to this inland type of watercraft has never been applied is because the issue has never been directly presented as it is here. In other words, the Circuit Court of Appeals would have been equally correct in stating that it had been unable to find where this tax apportionment principle **had ever**

been denied under the particular facts in the cases at bar. This particular type of case has never been decided by this Court, and the question is wide open for decision under the facts and the law applicable, and calls for a decision now that the issue is squarely presented to this Court.

The tax apportionment principle has been decided and allowed as to railroads, and similar types of transportation, which cases are more nearly analogous to the issues presented here rather than to the issues in the old steamship cases cited and relied upon by the United States Circuit Court of Appeals.

The Circuit Court of Appeals failed to distinguish between the cases where tax apportionment has been allowed and the cases at bar, nor can a legal or logical distinction be shown as to the tax principles involved.

Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation.

Even if necessary to show a permanent tax situs for the purposes of taxation, this record is replete with evidence to show an average number of this watercraft in Louisiana at all times, thus clearly establishing a situs for the portion sought to be taxed.

Thus, the Circuit Court of Appeals incorrectly applied the law of situs.

The decision holds that Delaware can tax the watercraft of the American Barge Line Company and the Mississippi Valley Barge Line Company. This is contrary to established law, for Delaware is simply the resting place of the charters of these companies. No business whatsoever is conducted in Delaware and that State can afford no protection to this watercraft. The record shows that Louisiana and New Orleans offer and furnish adequate fire, police and health protection to this watercraft. This equipment cannot completely escape taxation, and under the law and the jurisprudence Louisiana and New Orleans are entitled to a fair share of these taxes.

While the Union Barge Line Corporation is a Pennsylvania corporation, and actually operated in that State, there is no Constitutional prohibition against another State taxing a portion of the movable property of such corporation, when such portion is permanently employed within such State.

In one of the more recent cases decided by this Court, *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292 (1944), the Court refused to hold that non-domiciliary States, which actually taxed a part of this aircraft, could not tax on the proportionate rule basis, holding that such question was not then before the Court. This issue is squarely presented now, and it is of extreme importance it be decided by this Court.

It is therefore respectfully submitted that, for the reasons stated herein, this petition for writ of certiorari should be granted.

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**SUPREME COURT OF THE UNITED STATES**

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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*MAY IT PLEASE THE COURT:*

We shall endeavor to be as brief and concise as possible.

The jurisdiction of this Court is invoked upon the holding by the United States Circuit Court of Appeals that the watercraft of these three barge lines "acquired no tax situs in Louisiana and that no tax could be legally assessed and collected by that State or by the City of New Orleans." While the Circuit Court of Appeals did not specifically so state, we presume it inferred that the retention of these taxes by the State of Louisiana and the City of New Orleans, violates the due process clause of the Constitution of the United States, as held by the Judge of the United States District Court, the Circuit Court of Appeals, affirming the judgment of the District Court as to these nine cases.

We shall deal then specifically with this issue.

**THE TAX APPORTIONMENT PRINCIPLE HAS BEEN APPROVED BY THE SUPREME COURT OF THE UNITED STATES, WITHOUT THE NECESSITY OF SHOWING A PERMANENT TAX SITUS, AS SUCH, TO ALLOW THE STATES A FAIR SHARE OF THE TAXES.**

In the many cases where tax apportionment has been allowed by this court, it has never been necessary to show that the identical movable property remained within the State's borders throughout the year.

In the case of *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 35, 35 L. ed. 613, this Court said:

> "The cars of this company within the state of Pennsylvania are employed in interstate commerce;

but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and from upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it would not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact, that instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, **without regard to the place of the owner's domicile,** could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state. (Emphasis ours.)

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the

whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States."

In the earlier case of *Marye vs. Baltimore and Ohio Railroad Co.*, 127 U. S. 117, 8 S. Ct. 1037, this Court had occasion to observe:

"It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the situs of all its personal property; **but for purposes of taxation,** as well as for other purposes, that **situs** may be fixed in **whatever locality** the **property** may be **brought and used by its owner by the law of the place where it is found.** If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there **habitually to use and employ** a portion of its movable personal property, and the railroad com-

pany chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, **its fair share of the burdens of taxation** imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an **appraisement and valuation of the average amount of the property thus habitually used,** and collected by distraint upon any portion that might at any time be found. . . . "the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (Emphasis ours.)

In both the *Marye* Case (1888) and the *Pullman's Palace-Car Co.* Case (1891) (supra), as well as in the later cases of *American Refrigerator Transit Co. vs. Hall,* 174 U. S. 70, 19 S. Ct. 599, 43 L. ed. 899 (1899); *Union Refrigerator Transit Co. vs. Lynch,* 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708 (1900); *Union Refrigerator Transit Co. vs. Kentucky,* 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); *Union Tank Line Co. vs. Wright,* 249 U. S. 275, 39 S. Ct. 276, 63 L. ed. 602 (1919) and *Johnson Oil Ref. Co. vs. Oklahoma,* 290 U. S. 158, 54 S. Ct. 152, 78 L. ed. 238, (1933) the United States Supreme Court has uniformly held that where a corporation brings into a state **other than the one granting it the corporate charter,** a portion of its movable property to therein employ and use the same in the conduct of its business operations for

profit, carried on as one entity, in more than one state, such permanently established portion may be constitutionally taxed in said second state, by resorting to the generally adopted and approved method of first valuing as a unit the entirety of the taxable corporate property employed in the interstate operations, taking into consideration the uses to which it is put and all elements making up its aggregate value, and then ascertaining what proportion of the corpus may be fairly taxed as being within the bounds of the State in interest, without violating any Federal restriction.

Certainly the principle involved in the same, whether it be railroads, airlines, motor freight lines or inland barge lines. Obviously there is a physical distinction but there can be no legal distinction as to the tax principle involved.

It must be remembered that this is not a tax on the right to use a navigable stream. This watercraft is constantly and regularly affixed to the **land** of the State of Louisiana and receives the same services as do strictly land transportation companies. True, the railroads use the land of the State, but this right-of-way is usually owned by the railroads. Thus they pay for the land and additionally they yearly pay taxes on the land owned. They are not using land owned by the State but owned by themselves, and yet they pay a proportionate tax on their rolling stock moving within and without the State over their land.

Here, the watercraft of these barge lines use the land belonging to the State, and yet they seek to escape their fair share of taxation because they use a free waterway when travelling. The States own the beds of all streams within their borders, as well as the adjoining batture. Thus, there is no logical reason to attempt to differentiate, as to these tax principles, between railroads and inland barge lines engaged in interstate commerce.

Evidently, because this particular issue has never been decided by this Court, the Circuit Court of Appeals felt it necessary to rely on the decisions in the old steamship cases, which are clearly distinguishable from the issues here. Those isolated vessel cases cannot be a sound basis for deciding an issue involving many towboats and barges engaged as an entity constantly and regularly, over fixed routes, in interstate commerce, as part of an integrated system of inland transportation. Unless many of those old steamship cases were decided in the manner in which they were decided, it may have resulted, as this Court has said "in an entire escape from taxation". *Southern Pacific Co. v. Kentucky* (1911) 222 U. S. 63, 32 S. Ct. 13.

In **every** steamship or vessel case cited by the Court of Appeals in support of its findings, there was shown to be a **real** residence or an **actual** domicile of the owner, and thus the Court was able to find an actual "situs" of the vessel for the purpose of taxation. But not one case was cited, nor can any be cited, where the "domicile" of the owner was a mere resting place of the charter, and such a state held to be the "situs" of movable property.

Then, to hold, as the Circuit Court of Appeals has held here, that Delaware could tax this watercraft of the American and Mississippi Valley Barge Lines, is untenable. It would result in a complete escape from taxation. This Court has never yet held that a State, which is merely the resting place of a charter, could tax property outside such State, when such corporation (1) does no business in the State of incorporation, (2) has no office there, but has only an agent for the service of process, (3) has never sent its vessels there, (4) operates its entire business from offices located elsewhere, (5) pays no taxes there, and (6) has no stockholders nor officers resident there.

This issue is being here presented for the first time.

Certainly, Delaware "can afford no substantial protection to the property taxed and cannot effectively lay hold of any interest in the property to compel payment of the tax". *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *Frick v. Pennsylvania*, 268 U. S. 473, 489 et seq.

Yet this watercraft cannot legally escape taxation everywhere!

As to the Union Barge Line Corporation, even if its domicile, Pennsylvania, should choose to tax this watercraft, there is no constitutional prohibition against Louisiana exacting its share upon that portion of the corpus always within its borders—even if it resulted in double taxation! This Court, in the case of *State Tax Commis-*

*sion v. Aldrich* (1942), 316 U. S. 174, 62 S. Ct. 1008, could not find any prohibition against double taxation of intangibles in either the Fifth or the Fourteenth Amendments to the Constitution, and it intimated the same thing with regard to tangibles in *Northwest Airlines, Inc. v. Minnesota* (1944), 322 U. S. 292, 64 S. Ct. 950, 952, when it said:

> "The fact that Northwest paid personal property taxes for the year 1939 upon some proportion of its full value of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxation of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us."

The case of *Northwest Airlines, Inc. v. Minnesota (supra)* throws some interesting illumination on the issues presented here as to the Union Barge Line Corporation. That case involved airplanes flying through several states. If the right to use navigable waters is free, consider how much more free is the use of the air. The air routes are not near so fixed and definite as this watercraft on inland streams. As the Government of the United States controls the use of navigable waterways, it also controls air travel (Civil Aeronautics Board).

Yet, while this Court held that Minnesota, the actual and real domicile, had the right to an *ad valorem* tax on this aircraft, it refused to rule that non-domiciliary states could not tax a portion of the same aircraft, holding that this particular issue was not then before the Court.

The Union Barge Line case here, presents the issue now.

The American Barge Line and Mississippi Valley Barge Line cases herein, present an even stronger issue in favor of the right of Louisiana and New Orleans to tax in accordance with the Louisiana law, because the state of domicile (Delaware) under the established jurisprudence, has never been given the right to tax under these circumstances.

The importance of having these new issues decided now, by this Court, cannot be over-emphasized!

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**IF NECESSARY TO BE SHOWN, THE ADMITTED, UNDISPUTED FACTS SHOW A DEFINITE AVERAGE NUMBER OF THIS WATERCRAFT IS IN LOUISIANA EVERY DAY IN THE YEAR, THUS CLEARLY ESTABLISHING A SITUS FOR THE PORTION SOUGHT TO BE TAXED.**

The facts are not in serious dispute here. The schedules, movements, and routes of this watercraft were all adduced from plaintiff companies themselves.

The undisputed evidence shows that the towboats of each of these Lines come into New Orleans, once a week or oftener, with a string of barges, throughout the year. The towboats tie off the string of barges and as soon as a northbound tow is made up, the towboats proceed back up the Mississippi River. The barges left behind in New Orleans are unloaded, re-loaded, or transferred to other carriers for further movement. Before the first string of

barges is ready to move back up the River, another tow-boat of the same Line is back with another string of barges to be left behind. Thus, from this constant overlapping, the record clearly shows that an average number of this watercraft is in New Orleans every day in the year.

Obviously, then, Louisiana is the permanent situs for this average number of watercraft within its borders constantly. Never, for one day in a year, is all this watercraft absent from Louisiana!

If necessary, then, to show a permanent situs for an average portion of this watercraft, this record clearly shows it for each of these three Barge Lines.

Also, there is no difficulty whatsoever in fixing the mileage in Louisiana, as compared to the total mileage of the whole system. These barge lines run over fixed routes on inland waterways, and the mileage of these routes is as fixed and definite as any other interstate transportation company.

---

## CONCLUSION.

The levying of these taxes on the proportionate mileage basis by the State of Louisiana and the City of New Orleans, violates no provision of the Constitution of the United States and certainly does not constitute the taking of property without due process of law, as held by the United States Circuit Court of Appeals. Taxes levied under this Louisiana statute result in fair and just taxation; prevent a pyramiding of taxes; banish the twin

specters of exemption from taxation and multiple taxation; and should now be held constitutional by this Court.

To allow the judgment of the Circuit Court of Appeals to stand will nullify these provisions of the Louisiana Statute and hold it invalid as to these *ad valorem* taxes.

We therefore respectfully urge that a writ of certiorari should be granted.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

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**Nos. 818, 820, 822, 824**

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LIONEL G. OTT, COMMISSIONER OF PUBLIC FINANCE AND EX-OFFICIO CITY TREASURER, ETC.,

Petitioner,

*versus*

AMERICAN BARGE LINE COMPANY, MISSISSIPPI BARGE LINE AND UNION BARGE LINE CORPORATION,

Respondents.

(CONSOLIDATED).

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**Nos. 819, 821, 823, 825, 826**

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GEORGE MONTGOMERY, STATE TAX COLLECTOR, ETC.,

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*versus*

AMERICAN BARGE LINE COMPANY, MISSISSIPPI BARGE LINE AND UNION BARGE LINE CORPORATION,

Respondents.

(CONSOLIDATED).

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## OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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ARTHUR A. MORENO,
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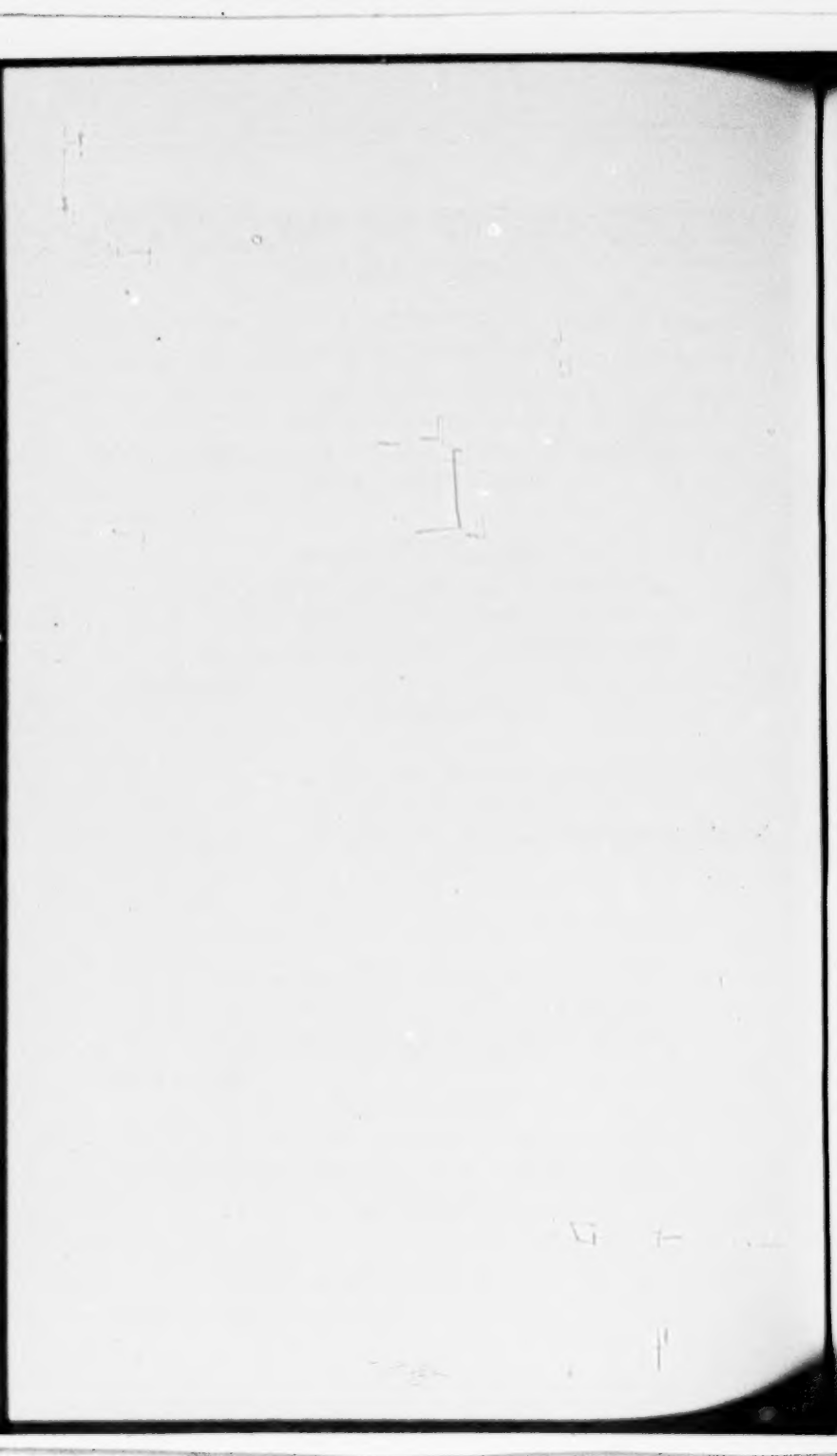

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*May It Please the Court:*

The decision of the United States Circuit Court of Appeals (Fifth Circuit) did not turn upon a question of

law, but turned upon a question of fact. The fact decided by the court was that the floating equipment of the three respondents did not have a taxing situs in the State of Louisiana, and, consequently, the State of Louisiana and its agencies were without power to tax. The court clearly stated the issue in the following words:

> "The question common to the various appeals is whether tugboats and barges owned by the different appellees, all non-resident corporations, are taxable in Louisiana as property having a tax situs there".

The court further found that the water equipment of the three respondents came into Louisiana in connection with interstate commerce and remained there only long enough to accomplish the purposes of such commerce. The court further said, with reference to the three respondents, as distinct from the DeBardeleben Coal Corporation, the fourth appellee, the following:

> "The other three operate up and down the Mississippi and its tributaries to points as far north as Minneapolis and east to Pittsburgh. In all trips to Louisiana a tug brings a line of barges to New Orleans, where the barges are left for unloading and reloading and where the tug picks up a loaded line of barges for ports outside Louisiana. These turnarounds are accomplished as quickly as possible and there is no regular schedule in the sense of a timetable held to. The result is that the tugs and barges are within the boundary of Louisiana only a small portion of the time. Of the total time covered

by the interstate commerce operations in 1943, American's towboats spent about 3.8% within the port of New Orleans. In the case of Mississippi for that year, its towboats spent about 17.25%, and its barges about 12.7%; in 1944, its towboats about 10.2%, and its barges about 17.5%. In 1944, Union's towboats spent about 2.2% and its barges about 4.3%".

The Court of Appeals further said:

"The court below found from these facts that the tugboats and barges of American, Mississippi, and Union were never permanently within the State of Louisiana during the tax years, hence had no tax situs in Louisiana and could not be taxed by that State or by the City of New Orleans".

The court then reviewed a number of cases and said:

"Applying these legal principles to the facts of this case, we are of the opinion that the court below was correct in holding that the tugboats and barges of Mississippi, American and Union acquired no tax situs in Louisiana, and that no tax could be legally assessed and collected by that State or by the City of New Orleans".

That the court based its decision on a question of fact must be clear from the recitation of what the Court of Appeals said. The conviction that the case turned upon a question of fact, and not upon a denial of principles of law, asserted by the petitioners here, is re-enforced by the fact that the court found that the property of the DeBar-

deleben Coal Corporation did have a taxing situs in the City of New Orleans. It did not deny to the petitioners the application of the principles for which they contended, but, on the contrary, upheld the assessment made by the Louisiana Tax Commission on a proportionate basis, which assessed to the DeBardeleben Coal Corporation 25% of the value of all its watercraft. However, the United States District Court found, and the United States Circuit Court of Appeals affirmed the finding that, in the assessment, had been included barges in Alabama which had never been within the taxing jurisdiction of the State of Louisiana. If the court had denied to the petitioners the application of the principles for which they contended, it would have decided against the petitioners in favor of the DeBardeleben Coal Corporation, but, instead of so deciding, it remanded the DeBardeleben Coal Corporation case to the United States District Court to correct the assessment by the excision of the value of the barges in Alabama. It must, therefore, be clear that these cases turned upon questions of fact. In the case of the respondents here, the facts of no taxing situs were found in favor of the respondents. In the DeBardeleben Coal Corporation case, the court found in favor of the petitioners and held, as a matter of fact, that the property of the DeBardeleben Coal Corporation did have a taxing situs in Louisiana. It impliedly sustained the method of assessment as to the equipment with taxing situs in Louisiana, but remanded the case only to eliminate barges in Alabama and never in Louisiana.

In the questions said to be presented for decision here, it is said that one of the questions is:

> "Whether there is a need to establish a permanent tax situs, as such, of movable property engaged as an entity in interstate commerce, which operates constantly and regularly within the State of Louisiana, in order to entitle the State to its share to these taxes in proportion to the mileage of such watercraft within and without the State identically as allowed in the case of the rolling stock of railroads and on the equipment of other types of transportation companies engaged in interstate commerce".

We take sharp issue with the basis of fact which underlies the suggested question. There is nothing in the record which says that the property which is taxed "operates constantly and regularly within the State of Louisiana". The record clearly shows that these towboats and barges come to New Orleans at irregular intervals and some may come often, while others come infrequently. Unquestionably, had the court found as a fact that any towboat or any barge operated "constantly and regularly within the State of Louisiana", it would have found that such towboat or such barge or barges had acquired a taxing situs in the State of Louisiana. Upon a correct appreciation of the record, the court did not find as a fact that which is stated as a fact as the basis of the question.

It is asked as to why the State of Louisiana is not entitled "to its share to these taxes in proportion to the

mileage of such watercraft within and without the State". The destructive answer to this question is that the assessment was not based upon a mileage schedule traveled within and without the State of Louisiana, but was based upon the conception of fairness of the Chairman of the Louisiana Tax Commission. When asked on what basis he allocated a proportion of the total value of the property of these respondents to Louisiana for tax purposes, he answered:

> "I would have to answer that it is purely an arbitrary figure because we failed to get the information from the taxpayer".

He further said:

> "Well, I could not say we made our assessment on a mileage basis, we are trying to ascertain what property the Mississippi Valley Barge Line Company owned and then it appears from the record here that we estimated a value on all of their holdings and then made an arbitrary assessed value".

He further said that:

> " * * * did ascertain that they owned considerable watercraft and made an arbitrary assessment on the information that we received outside of the report that was made".
>
> * * * * * * *
>
> "I am not in a position to say it was a mileage basis, it was only an arbitrary estimated value because we failed to get any further information".

That the assessment was not made on a mileage basis, but was made on a time basis is shown by his testimony. When asked how he arrived at the 25% proportion which was adopted, he said:

> "Just an ordinary figure, they might have been here a 100% of the time, or they might have been here more than 50% of the time, but we figure that that would be a fair assessment for the property in Louisiana".

He was asked:

"Q. Do you know any definite basis for the adoption for 25% any more than 50% or 10%?

"A. No, sir".

The other members of the Louisiana Tax Commission testified substantially as has the Chairman of the Louisiana Tax Commission. There is not a single word in the transcript which shows that the Louisiana Tax Commission knew the mileage traveled by this equipment within the State and without the State, and, consequently, it had no basis for the proportionate system of taxation for which petitioners contend.

The question is propounded:

> "Whether, if such a tax situs must be established to allow a State to tax, there has not been established a tax situs as to that average number of this watercraft which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation".

No where did the trial court, nor the Circuit Court of Appeals find that there was an average number of watercraft belonging to the respondents which is in New Orleans and Louisiana every day in the year as part of an integrated system of inland water transportation. If the court had found that there was such an average number of watercraft of the respondents in Louisiana every day, it would have done so in defiance of the evidence. There is no single word in the transcript which would support the statement of an average number of watercraft in New Orleans, or in Louisiana every day of the year.

Equally, there is nothing in the transcript to show any integrated system of transportation, such as a railroad, laid upon rails, with definite and ascertainable termini. The evidence shows a transportation system using towboats and barges. Each towboat and each barge is an entity. Each has an individual value, and, in most cases, each differs from the others. One barge is not related to another barge, and one towboat is not related to another towboat. There is nothing to suggest an integrated system, but only facts to sustain the conclusion that different barges and different towboats, unrelated to each other, are used as a means of transportation. To designate such a system as "integrated" is to overlook the principle of integration announced by this court in other cases. A system is integrated when each part has a definite relationship to each other part, so that one part gives value to other parts. The poles which support the telegraphic wires of a railroad are just as necessary to the operation of the trains as the rails upon which they roll. One cannot be used without the other, and so each gives value to the other.

Each barge of the respondents could be used without relationship to any other barge. The mere fact that they are placed in tows does not make them a part of an integrated system. This is more particularly true as these barges are used indiscriminately and indifferently whenever the needs of transportation require. No two barges are always in the same tow, but a barge may start at one point and be taken out of the tow and not returned in a tow with the same barges throughout the year. The theory of integration asserted here fails because of the absence of the facts of integration.

It is sought to assimilate to this case the principle of *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18. If the principle of that case were applicable to the assessment of the property in this case, the method employed here is wholly different from the method employed in the cited case. The court, in upholding the system of assessment by Pennsylvania, said:

> "The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which ran cars within the state borne to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock and no more. The validity of this mode of apportioning such a tax is sustained

by several decisions of this Court in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this Court extended to the determination of the whole case, and was not limited, as upon writs of error to the State Courts, to questions under the constitution and laws of the United States".

In that case, there was a definite basis for the assessment. The measure of the entire tax on the property of the corporation was the capital stock of the company. The entire mileage of the company was taken and the tax was based upon the ratio of mileage to the capital stock. There were two definite and determined factors for making the assessment. In this case, there was no fact of taxation upon which the assessment was based, but the assessment was made on an arbitrary conception of fairness by the Chairman of the Louisiana Tax Commission. He allocated to Louisiana a percentage of the entire value of the property of the respondents, but knew of no reason for his selection of the percentage, except his desire to be fair to other states by leaving to other states 75% of the value of the property. If the court should uphold such a system of taxation, each state, by the selection of what it considered fair to itself, could make arbitrary and conflicting assessments. Unlike the case of *Pullman's Palace Car Company v. Pennsylvania*, each state would select its own factors of value and a percentage which it believed to be fair. In the *Pullman's Palace Car Company* case, there was a definite basis of assessment, which bound all states, so that the aggregate of the assessments could never exceed 100% of the value. If the method employed by the

Louisiana Tax Commission were upheld, each state, by the arbitrary selection of its own percentage, might create an aggregate of assessment which would be confiscatory.

The case of *Marye v. Baltimore & Ohio Railroad Company*, 127 U. S. 117, 8 S. Ct. 1037, is quoted to the effect that where property is found in a taxing jurisdiction, a tax may be constitutionally applied. No one disputes the correctness of the principle, nor denies its application to proper cases. The mere fact, however, that transportation facilities are brought into a state temporarily in connection with interstate commerce, does not subject them to the taxing power of the state. It is undeniable that in the cases at bar the water equipment of the respondents came into the State of Louisiana for purposes directly connected with interstate commerce, and when such purposes had been served, departed promptly. In each of the cases, the testimony shows that it was to the advantage of the owners of this equipment to unload the barges as promptly as possible, to reload them and to depart for other destinations as quickly as possible. Towboats and barges have an earning capacity, based upon day by day activity, and, consequently, neither the towboats nor the barges were permitted to remain in Louisiana any longer than dictated by the business needs of the owners. Unlike the railroad cars, or the average number of cars taxed in the *Pullman's Palace Car Company* case, they did not acquire a factual situs by remaining sufficiently long to fulfill the concept of a taxing situs.

It is argued, without the support of the record, that there is, or was, an average number of barges in Lou-

isiana every day of the year. The statement finds no support in the recorded facts and even if there had been an average number of towboats and an average number of barges in Louisiana every day of the year, there is not a single word of evidence to support the conclusion that an average number of towboats and an average number of barges were taxed. The most that the evidence shows is that, reaching into thin air, the Louisiana Tax Commission assessed the property of the respondents by taking the value of the entire fleet, and then allocating a percentage of this value for assessment purposes for taxation in Louisiana. The members of the Louisiana Tax Commission had to concede that the assessment was arbitrary and is bottomed upon no fact to which they could point which would constitutionally support an assessment.

The statement that:

> "Obviously, then, Louisiana is the permanent situs for this average number of watercraft within its borders constantly",

finds no support in the evidence and rests upon no principle of taxation. Equally, the statement that these barge lines run over fixed routes on inland waterways challenges the facts found in the transcript. While it is true that in certain cases they run between two distant cities, yet, they do not run regularly over any fixed routes, because they go on these waterways wherever cargo requires transportation. No where in the record is there a single fact to establish the mileage over which this equipment travels, nor is there anything in the transcript to show that, like a railroad, the number of miles is constant yearly. On the

contrary, the testimony is that these towboats and barges go on these waterways wherever cargo is available, but they do not travel, day by day, over fixed routes, with a constant mileage. It would tax the ingenuity of the most imaginative to show in this record a single word showing the number of miles over which the watercraft of any of these respondents traveled.

In the reasons for the issuance of the writ, it is said that the Circuit Court of Appeals, as the basis for its decision, states:

> "But so far as we have been able to find this principle of apportionment has never been applied to watercraft using the high seas or navigable inland waterways".

From this excerpt, it is impliedly argued that the Court of Appeals denied the validity of the contention of the petitioners that apportionment is the proper principle of assessment for watercraft. We respectfully say that while this appears in the decision, the Court of Appeals clearly held, in no uncertain terms "that the tugboats and barges of Mississippi, American and Union acquired no taxing situs in Louisiana". Since this watercraft had no taxing situs in Louisiana, it could not be taxed according to any method of taxation, whether upon the apportionment theory, or upon any other theory. If it constitutionally was not subject to taxation, it could not be made so by the selection of a method of assessment. The Court of Appeals, therefore, was neither called upon to decide, nor did it decide, as to these respondents, the question of the validity of the apportionment theory, since it held that

upon no theory of assessment could the property of the respondents be assessed because of the fact that it had no taxing situs in Louisiana. As to the DeBardeleben Coal Corporation it impliedly upheld the validity of the apportionment principle of assessment.

It is fallaciously stated:

> "Where tax apportionment has been allowed, it has never been necessary to show a permanent tax situs, as such, of this equipment, to allow a State its share of taxation".

It is fundamental that before property can be taxed, it must have a taxing situs. The taxing system is wholly different from the fundamental need of situs. If property does not have a situs in a state, it cannot be taxed, and the inventive genius of taxing officers in choosing a method of taxation cannot constitutionally subject property having no taxing situs to taxation, because of the choice of methods. Since the Court of Appeals found that these respondents had not factual situs for taxation in Louisiana, the question of method became irrevelant since there was no property upon which the system could operate.

The statement that "the Circuit Court of Appeals incorrectly applied the law of situs", is not supported by any principle or decided case. It rests upon a mere *ipsi dixit* of counsel for the petitioners, and upon no fact in the record. The principles governing the decision as to the situs of watercraft are found in the various cases cited by the Court of Appeals. These principles have been sanctioned by long years of recognition and by an unchanged

jurisprudence. They find recognition in the decision of *Northwest Airlines, Inc., v. Minnesota*, 322 U. S. 292. It is argued that while these principles are applicable to steamships, they are not applicable to towboats and barges. No ground of distinction is stated by the petitioners, nor any principles of law cited in support of the bald statement. The argument seems to rest upon the theory that if Delaware, the charter state of two of the respondents, and Pennsylvania, the charter state of the other respondents, do not tax this equipment, that, automatically, there is conferred upon Louisiana, and other states, a power of taxation, regardless of the fact that such water equipment does not have a factual situs for taxation in these other states. While the implication of the argument may be denied, the conclusion yet remains that the contention is that this equipment must be taxed, and since it must be taxed, Louisiana has the power of taxation, regardless of the fact that it is neither the charter state nor the state where the watercraft has an actual taxing situs. The destruction of the argument lies in its mere statement.

In conclusion, we respectfully say that the Court of Appeal did not deny the contention urged by the petitioners in support of the validity of the assessment, and the constitutional power of Louisiana to exact the tax. What it found in each of these cases was that the towboats and barges came to Louisiana in connection with interstate commerce and remained but a small portion of the time, measured by the need of unloading and loading the barges, and that as soon as those essential facts of interstate commerce had been effectuated, the equipment departed for other ports. In the case of the DeBardeleben

Coal Corporation, it found a different factual situation, and notwithstanding the DeBardeleben Coal Corporation is a Delaware corporation, it held that its towboats and barges exclusive of those in Alabama, had a taxing situs in Louisiana, and so upheld the power of taxation of the State of Louisiana. It, however, did not decide that the system of taxation employed by the Louisiana Tax Commission was improper, because it was never called upon to make that decision since it found that, under no system of assessment, could the property of these respondents be taxed since Louisiana was not the charter state, nor the state where the property, because of its relative permanence in the state, had acquired a taxing situs. The decision of the Court of Appeals is in harmony with the jurisprudence of this Court, so that the application for the writ should be denied.

Respectfully submitted,

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